IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARIS WATERS,	)	
	)	No. 393, 2008
Defendant Below,	)	
Appellant,	)	Court Below: Superior Court
	)	of the State of Delaware in
v.	)	and for New Castle County
	)	
STATE OF DELAWARE,	)	Cr. ID No. 0705019531
	)	
Plaintiff Below,	)	
Appellee.	)	

Submitted: March 11, 2009
Decided: May 20, 2009

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 20th day of May 2009, it appears to the Court that:

(1) Paris Waters, the defendant below, appeals from his Superior Court conviction of Rape in the Second Degree. Waters contends that the trial judge violated his substantial rights to the effective assistance of counsel and a fair trial when it dispensed with the State's initial closing argument. Because Superior Court Criminal Rule 29.1 controls and requires the prosecution to open the arguments, we find plain error and need not address Waters' constitutional claims. Accordingly, we reverse.

(2) In the evening of April 19, 2007, twenty year old Waters invited fourteen year old cousins Alexis and Jenna into his home.[1] Jenna and Waters were neighbors, and all three had known each other for most of their lives. Waters' mother was not home at the time, but his cousin was there with him.

(3) At trial, Alexis, Jenna, and Waters each provided different versions of what transpired once the girls entered Waters' house, but all three agreed that, at some point, Alexis and Waters went upstairs to Waters' bedroom while Jenna and Waters' cousin remained downstairs. After about five minutes, Alexis and Waters returned. Shortly thereafter, all four people present—the girls, Waters, and his cousin—went upstairs to Waters' bedroom. Waters shut the door from the inside, inhibiting anyone from coming into the room. Then, according to both Jenna and Alexis, Waters sat Alexis on his bed and Alexis performed oral sex on him. Jenna and Waters' cousin were still in the room at this time and were also sitting on Waters' bed. After five to ten minutes, Waters laid Alexis down on his bed. At that point, Waters' mother entered the bedroom, after struggling with a hamper that been placed to block the door. Angered, Waters' mother told the girls to leave immediately. An argument ensued between Alexis and Waters' mother, and the police were eventually called.

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[1] The parties assigned pseudonyms to the two complainants in this case.

(4) On July 23, 2007, a grand jury indicted Waters on two counts of rape in the second degree. He waived his right to a jury trial, and the trial judge held a bench trial on March 11, 2008. At the conclusion of the evidence, the trial judge stated:

> At this point because the State's position I think is relatively clear to me as a more sophisticated fact finder, I'm more inclined to hear what the defendant's argument is. And along those lines, . . . I think you're going to have to focus on why the two girls would have made up a story that would get the defendant into so much trouble. And then the State will have rebuttal. And if it turns out, because of the way I'm doing the oral argument, you feel that you're being sandbagged, . . . I'll give the Defense a little surrebuttal to deal with that. So why don't we proceed on that basis.

(5) Neither party objected, and the proceedings continued in the manner suggested by the trial judge. Defense counsel gave a closing summation, followed by the State's rebuttal and the Defense's surrebuttal. After a recess, the trial judge found Waters guilty of one count of rape in the second degree and not guilty of the other count. The trial judge sentenced Waters to ten years at Level V followed by two years at level III. This appeal followed.

(6) Waters contends that the trial judge violated his rights to the effective assistance of counsel and a fair trial under the Fifth and Sixth Amendments to the

United States Constitution[2] and Article I, section 7 of the Delaware Constitution.[3] Waters argues that the trial judge erred by improperly dispensing with the State's initial closing argument and by requesting that defense counsel give the initial closing argument followed by the prosecutor's rebuttal. Waters also argues that the judge improperly required him to explain why the State's witnesses were fabricating their testimony. Were we to review these claims, because Waters did not fairly present them to the trial judge, we would review for plain error.[4] For an error to be plain, the error must affect the defendant's substantial rights and therefore affect the trial's outcome.[5] Here, for the reason that follows we need not undertake plain error review of these claims.

(7) Closing arguments provide an "opportunity finally to marshal the evidence for each side before submission of the case to judgment," and are an

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[2] U.S. CONST. amend. V. ("No person shall … be deprived of life, liberty, or property, without due process of law…."); U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.").

[3] DEL. CONST. art. I, § 7 ("In all criminal prosecutions, the accused hath a right to be heard by himself or herself and his or her counsel….").

[4] SUPR. CT. R. 8; *Hackett. v. State*, 888 A.2d 1143, 1145 (Del. 2005) ("Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal unless the error is plain.") (citing *Capano v. State*, 781 A.2d 556, 653 (Del. 2001); *Hardin v. State*, 840 A.2d 1217, 1219 (Del. 2003) ("In the absence of a timely objection at trial, any claim of error is reviewed on appeal by this Court for plain error."); *see also* DEL. R. EVID. 103.

[5] *Keyser v. State*, 893 A.2d 956, 959 (Del. 2005).

integral and indispensable part of the adversarial system.[6] In addition, they are an aspect of a fair trial that is implicit in the assistance of counsel guaranteed by the United States and Delaware Constitutions.[7] Accordingly, counsel's obligations to marshal the facts in closing are inextricably tied to an orderly trial process.[8] These concerns limit trial judges' discretion to manage the scope and duration of a trial. Delaware Superior Court Rule 29.1, entirely consistent with limiting that discretion, provides that: "After the closing of evidence the prosecution *shall* open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal."[9] That rule closely follows its federal counterpart,[10] which was "designed to control the order of closing argument," with the purpose that "fair and effective administration of justice is best served if the defendant knows the arguments actually made by the prosecution in behalf of

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6 *Herring v. New York*, 422 U.S. 853, 862 (1975).

7 *Id*. at 865; *Hooks v. State*, 416 A.2d 189, 204-05 (Del. 1980).

8 *See Herring*, 422 U.S. at 862-63.

9 SUPER. CT. CRIM. R. 29.1 (emphasis supplied).

10 FED. R. CRIM. P. 29.1 ("Closing arguments proceed in the following order: (a) the government argues; (b) the defense argues; and (c) the government rebuts.").

conviction before the defendant is faced with the decision whether to reply and what to reply."[11] The similarly worded Delaware Rule shares this purpose.

(8) The mandatory language in Rule 29.1 dictates the order of closing arguments. This bright line rule contemplates no judicial discretion. For the policy reasons outlined above, we must assume that Rule 29.1's drafters intended that "the prosecution *shall* open the argument" even in a bench trial where the trial judge rationally concludes that both he and defense counsel know precisely which arguments the State will address in its rebuttal to the defense's closing.

(9) In this case, the trial judge directed an alternative order for closing arguments not contemplated by Rule 29.1 and contrary to its purpose. Even if the prosecutor's failure to object to the order of summation is construed as an implied waiver of her opening summation, the procedure utilized here still violated Rule 29.1. The prosecution received an opportunity for rebuttal, which the prosecution ordinarily waives when it declines opening argument.[12] Because the order of argument violated Rule 29.1, we reverse Waters' conviction.

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[11] FED. R. CRIM. P. 29.1 advisory committee's note; 2A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 471.

[12] Allowing the state to waive its opening argument, yet retain the right to rebut, opens the door for "sandbagging," which occurs when a prosecutor omits from his opening summation a salient argument of the State's case only to bring forth the argument in closing after the defense has arguably been induced to avoid the subject in closing. Sandbagging deprives defendants of a fair trial and is prohibited. *DeShields v. State*, 534 A.2d 630, 645 (Del. 1987); *Bailey v. State*, 440 A.2d 997 (Del. 1982); *see also* FED. R. CRIM. P. 29.1 judiciary committee's note ("The

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and **REMANDED** for a new trial**.**

BY THE COURT:

/s/ Myron T. Steele
Chief Justice

Committee is of the view that the prosecutor, when he waives his initial closing argument, also waives his rebuttal"); 2A MOORE'S § 471 ("The rule is silent on what happens if the prosecution waives its initial closing argument. The purpose of the rule, to allow the defendant to know the arguments on which the prosecution is relying before the argument for the defense is made, would be defeated if the prosecution could waive its opening argument and not disclose its position until rebuttal after the defense argument is made. Thus, it should be held that if the prosecution waives its opening argument it waives also any right to rebuttal.").